



Confederated Tribes and Bands
of the Yakama Nation

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Treaty of June 9, 1855

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Mr. Bob Lohn
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Mr. David Wesley
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U.S. Fish and Wildlife Service, Region 1
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RE: Comments on the Final Washington State Forest Practices HCP and FEIS

Dear Sirs:

We recently received notice and a copy of the Final Environmental Impact Statement (FEIS) for the Washington State Final Forest Practices Habitat Conservation Plan (FPHCP). The package included the Final FPHCP, FEIS, Appendices and Response to Public Comments. The total document content is approximately 2500 pages in length. The National Marine Fisheries Service and U.S. Fish and Wildlife Service (hereafter referred to as the Services) have requested that the documents be reviewed and comments supplied back to them within 30 days. Due to the massive amount of information in these documents, complexity of the proposals, their ramifications on Tribal resources and the proposed long term federal assurances (50-year period), we believe the highly abbreviated review and comment period of 30 days is far too short. In order to go through all of the documents, a reviewer would need to read at least 83 pages per day, every day, over the 30 day period. This would not even allow time to compile comments. In our view this is totally unreasonable and prevents the Yakama Nation from adequately evaluating and commenting on the proposals. **We would therefore respectfully request that the Services extend the review and comment period at least another 120 days.**

The FPHCP and FEIS include substantial portions of the ancestral lands of the Yakama Nation. The Yakama Nation has reserved Treaty Rights within these lands. The proposed actions need to ensure that Tribal Treaty and cultural resources important to the Yakama Nation are protected, preserved and enhanced. The FPHCP and FEIS need to not only meet the requirements of the Endangered Species Act (ESA), but also meet the Treaty trust responsibility of the Federal government to the Yakama Nation. To date, we

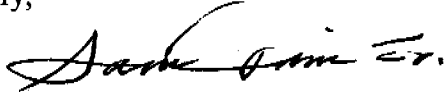
have not seen that the FPHCP meets the ESA, or more importantly provides sufficient protection to Treaty Rights and Tribal resources.

In an effort to provide some initial thoughts on the FPHCP and FEIS to the Services, Yakama Nation technical staff have compiled the following general comments and concerns regarding these proposals and the Services' response. The attached comments should not be viewed as comprehensive or complete because very little time has been provided by the Services to evaluate and respond to these immense documents. As already stated above, the review and comment period on these proposals needs to be extended at least another 120 days.

In closing, a decision on the FPHCP and FEIS should not be made for at least another 120 days to allow a reasonable time period for the Yakama Nation to provide comments. In addition the FPHCP and FEIS should not move forward until the comments and concerns expressed by the Yakama Nation have been incorporated into the documents. Finally, the Services' decisions and actions on these proposals is a Federal undertaking and therefore must comply with Section 106 of the National Historic Preservation Act (NHPA). Prior to any decision on the HCP and incidental take permits, the Services must develop, outline and explain how they will meet the requirements and compliance with the NHPA Section 106.

We thank you for your attention and interest in this important matter. Please let us know how our concerns and recommendations will be utilized by the Services.

Sincerely,



Sam Jim, Sr.

Chairman of the YN Fish, Wildlife, Law and Order Committee

C: (files)

Louis Cloud, Tribal Council Chairman
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Yakama Nation Technical Comments on the Final FPHCP and EIS

Small Landowner Rules and Exemptions:

Under most alternatives (including the preferred Alternative 2 in the HCP), small landowners (20-acre exempt parcels) can leave very narrow Riparian Management Zones (RMZs) along fish bearing streams, which will afford very little protection to aquatic resources or stream functions. For western Washington, the RMZs could be as narrow as 29 feet on fish-bearing streams for these lands. Leave tree requirements within these westside RMZs could be as few as 29 trees per 1000 feet (one tree every 34 feet along the stream). In addition, for clearcuts of 20 acres or less, when more than 10% of the harvest area is within RMZs or Wetland Management Zones, RMZ leave tree counts can be further reduced up to 50 percent. Similarly for eastern Washington, RMZ buffer widths could be as narrow as 35 feet for fish-bearing waters. On non fish-bearing streams, no protection measures would typically be required for these small landowners. Such weak riparian buffer requirements can be expected to allow significant adverse impacts to the stream system, listed fish, and other fish and aquatic resources.

These streamside buffers would also be similar to those outlined for Alternative 1-Scenario 2 where the FEIS acknowledges that a high to moderate impact could be expected on several key fish and stream functions. The FEIS mentions that a recent evaluation of practices on these exempt parcels found that most RMZs had no harvest within them. Our evaluation of some of these same forest practices indicates that this evaluation may not be totally accurate. In one case, the forest practice did not have a stream or RMZ, yet was reported to have a no-harvest RMZ. In another case, the forest practice proposed some harvest in the RMZ, but was reported as a no-harvest RMZ. These cases raise serious questions about the evaluation cited in the FEIS. Even if 20 acre exempt parcels are leaving no-harvest RMZ's today, there is no guarantee that landowners will voluntarily leave additional trees in the future. The current exemption rule allows substantial timber harvest alongside streams and would therefore permit adverse impacts to fish, stream functions, and other aquatic resources.

The documents also indicate that these 20-acre exempt parcel lands comprise a small fraction of the private forest lands (0.5 to 5%, depending on region), and therefore would have a small influence on watersheds. The documents note that these percentages may be conservative. Furthermore, recent studies in northern Puget Sound (Waldo and Wyman 2005) found a much higher amount and percentage of 20-acre exempt parcel lands along streams than previously reported. In addition, forestlands are continuing to be sold and subdivided. This trend is expected to continue. It is quite likely that a much larger amount of forest land will fall under this 20 acre-exemption rule during the proposed 50-year coverage period of these plans. The exemption rule would therefore result in more stream miles with few riparian protections measures, and thus adversely affect recovery and productivity of fish and other aquatic resources. The FPHCP and FEIS has not accounted for these adverse impacts. The small landowner exemptions should therefore not be granted Incidental Take Permits or included in the HCP.

Small landowners meeting the rule definition (less than 2 million board feet harvest per year) would also not be required under the FPHCP to do road maintenance and abandonment plans (RMAP) until a forest practice application is filed. At that time a simple check list would be completed. However, the check list approach gives little confidence that roads will be sufficiently improved. Ultimately roads for small landowners would continue to impact the stream system until forest practices are conducted, and very possibly after the harvest activities are completed. In addition, 20-acre exempt landowners do not have to accomplish RMAP's at all. These landowners are not required to submit either a checklist RMAP or regular RMAP. These lands would therefore be highly likely to cause adverse road impacts on the stream system and aquatic resources. Small landowner exemptions for road maintenance and abandonment improvements can be expected to adversely affect fish and stream functions.

Road Maintenance and Abandonment Plans (RMAP):

The various alternatives and HCP have requirements for landowners to complete RMAPs. The landowners would develop the RMAPs, submit them to the WDNR, and complete the work on a timeline. Priority is placed on correction of impassible fish barriers and road segments in close proximity to the stream system. While the general approach has potential benefits, the RMAPs have few quantifiable or measurable requirements. Furthermore the prioritization and timeline of the road work can allow impacts to occur on the short term. Road maintenance work and abandonment is developed and implemented by the landowner, but the efficacy of the work is uncertain or how well the actions will protect water quality, fish and other aquatic resources. It is therefore highly uncertain whether the RMAP process advocated in the FPHCP and FEIS will adequately prevent impacts from roads to aquatic resources and the stream system.

Wetlands:

Wetlands can provide a host of important biological, chemical, physical, and hydrological functions critical to the stream system and its aquatic resources. Some of the key functions of wetlands are their ability to ameliorate water quality, recharge ground water aquifers, retain and release nutrients, filter and store sediment, capture and moderate peak flow events, supply habitat for fish, amphibians and other aquatic dependent species, and maintain culturally important plant species. The HCP and preferred Alternative 2 have protection measures for some wetlands. Larger, non-forested wetlands would receive Wetland Management Zones (WMZs) buffers. It is unproven at this time if the WMZ buffer requirements will adequately protect necessary wetland functions. Of greater concern, little protection would be placed on smaller wetlands or forested wetlands. Wetlands less than 0.5 acres (except bogs and fens) have no buffer requirement or protection. Likewise, forested wetlands do not have buffers and the trees within them can be harvested with low ground disturbance techniques. In addition, wetlands up to 0.5 acres in size can be drained or filled without any requirements for replacement or enhancement of lost wetland functions. These practices are likely to allow adverse impacts to many wetland areas, and thereby reduce important wetland functions and critical values for fish and other aquatic resources.

Hydrologic Effects of Forest Practices:

The FPHCP and FEIS discuss effects that timber harvest activities and roads can have on the stream hydrology. Several studies, including those cited in the documents, have found that peak flows can be accentuated or their timing altered with inappropriate timber harvest activities. Hydrologic changes can have major ramifications for aquatic resources and stream morphology. Supposedly the proposed actions in the HCP and preferred alternative will limit any substantial impacts to hydrology. The plans explain that the forest practice rules will address timber harvest effects on peak flow increases through watershed analysis, the rain-on snow rule, and indirectly through the green-up rule. However, these rules do very little to limit timber harvest effects on watershed hydrology. Very few, if any, watershed analyses have been completed in recent years. Watershed analysis remains unfunded and there is little incentive for landowners to do them. It is not expected that watershed analysis will be conducted to any degree in the future. The rain-on-snow rule in our experience has also done little to limit timber harvesting effects on peak flows. The rule can be applied to restrict the amount of clearcut timber harvest and require the retention of hydrologically mature forest cover. However, we have not seen the rule implemented to any degree. In addition, the rule only deals with clearcut harvest. Heavy partial cut timber harvest has no limits, yet can also greatly affect peak flows and hydrology. Finally, the green-up rule has few restrictions on timber harvest patterns. This rule only requires that clearcut harvest areas be less than 240 acres in size. When the replanted harvest area is five years old or the trees are four feet tall, then the adjacent timber stands can be harvested. This does not maintain hydrologic maturity needed to moderate peak flows. This rule also only applies to clearcut harvest. Again, heavy partial cut harvest can be applied across a watershed with no limits. With all of this said, we are highly doubtful that the FPHCP and FEIS will address timber harvest effects on peak flows and hydrology, and ultimately allow adverse impacts on fish and other aquatic resources.

Type N (non fish-bearing) Streams:

Type N streams typically make up the majority of the stream length in a watershed. They have, among other important functions, a great influence on downstream waters (fish-bearing streams), water quality, peak flows, low flows, ground water recharge, sediment storage and routing, nutrient delivery, channel and bank stability, habitat for amphibians and insect communities, and habitat for riparian-dependent wildlife. The HCP and the preferred alternative contain some protection measures for Type N streams. Perennial Type N (Np) streams under these approaches would generally have 50-foot wide streamside buffers along a portion of their length (Westside 50%, Eastside 70% or managed 100%). Seasonal Type N (Ns) streams would have no buffer. For all Type N streams ground disturbance by equipment adjacent to the waters would be limited to 10% of the area, unless additional erosion control practices are implemented.

While these proposed protection measures may help reduce impacts, it is doubtful whether they will be sufficient to protect stream functions, water quality, fisheries, and other aquatic resources. As an example, the FEIS indicates its modeling of wood recruitment rates for a 50-foot wide buffer (Type Np streams) would be 48-92% of that

found for a mature stand in western Washington. Modeling for older stands with greater tree height would be an even lower percent wood recruitment rate. Taking into account that up to 50% of these buffers can be totally harvested on Type N streams in western Washington, the wood recruitment rate could be halved, or just 24-46%. Similarly in eastern Washington, buffers on Type Np streams can have up to 30% of their buffer length removed, or partial cut harvest can be done within the buffers down to basal area targets. In addition, no buffers are required on type Ns streams. These streams could have little or no wood recruitment. Such reduced wood recruitment rates would not be expected to provide adequate wood recruitment to these streams for properly functioning conditions or protection of downstream waters.

As another example, the HCP and most alternatives will permit stream temperatures increases on Type N streams. Up to 50% of the stream length can be cut on Type Np streams in western Washington. Little to no shade on these stream reaches is likely to greatly elevate temperatures. Another major concern is lack of any buffer requirements or shade on Type Ns streams. Some Type Ns streams flow into the summer months. With no shade or buffer, stream temperatures can substantially increase. The lack of trees can also cause elevated soil temperatures and heating of shallow ground water associated with these streams.

Furthermore, the HCP and most of the alternatives allow some ground disturbance activity along and in Type N streams. Up to 10 percent of the area within 30 feet of these streams can be disturbed. More area can be disturbed if erosion control practices are accomplished. Ground disturbing activities next to streams can significantly elevate sediment delivery and cause downstream impacts.

In summary, the proposed protection measures on Type N streams are weak. The allowable timber harvest and ground disturbance along Type N streams is expected to cause adverse impacts to water quality, downstream fish and stream functions.

Adaptive Management:

Under the proposed HCP and some of the Alternatives, adaptive management would be a key element. Adaptive management can be useful for assessing the effectiveness of the rules for resource protection and other components. In the approximately 4-5 years after the inception of the new rules, adaptive management has started to evaluate aspects of the rules. It is not expected that the adaptive management process will quickly resolve or answer the many uncertainties associated with the current rules that the proposed HCP and several of the Alternatives will be using. In addition, the adaptive management system has a strong political aspect. Even if certain rules are found to be inadequate, they may not be changed for political reasons. Furthermore, the HCP is seeking a "No Surprises" assurances rule if recent court rulings are vacated or overturned. A "No Surprises" rule with this HCP can place limits on the Services's ability to require additional mitigation after Incidental Take Permits have been issued. It is unclear under a "No Surprises" rule for the HCP whether adaptive management could effectively make changes where deficiencies were found. Finally, the adaptive management component of the HCP is highly dependent upon funding. The extensive research and monitoring work

needed under adaptive management can not be accomplished without ample funding. Sufficient funding to accomplish adaptive management over the 50-year commitment period is not assured or committed in the FPHCP or FEIS. Therefore, there is no reason to believe that "adequate funding" will occur for adaptive management.

We believe adaptive management can be valuable to assess the plans and rules for their ability to protect aquatic and other resources. However, adaptive management is expected to be a fairly slow process, has political constraints, may not have much implementation under a "No Surprises" rule, and is highly dependent upon adequate future funding. Moreover as discussed in previous sections, the proposed HCP under the existing forest practices rules has a great level of uncertainty and likelihood to impact aquatic resources. Adaptive management can assess these inadequacies over time, but in the interim, impacts can continue and cause long term damage. A much better approach would be implementation of rules and plans that are expected to have a fairly high likelihood of success. Then, adaptive management can be carried out to determine if minor changes are needed.

Funding for Adaptive Management and Compliance Monitoring:

As previously noted, adaptive management is a key component of the FPHCP. Adaptive management is highly dependent upon funding and staffing to research, monitor and investigate the efficacy of the HCP and Rules. The FPHCP does not contain any clear funding or staffing requirements to carry out adaptive management. It mentions the need for funding, but does not outline any necessary commitments. The Services mention that under the ESA Section 10 that "the applicant will ensure that adequate funding for the plan will be provided." However, there is no definition or clear understanding on what constitutes "adequate funding". This gives little assurance that sufficient funding, staffing, research or monitoring will be conducted over the life of the HCP. Therefore it is highly uncertain whether sufficient and timely adaptive management work will be carried out to address the many uncertainties contained in the HCP.

Funding cuts have already been observed for adaptive management work on the HCP. Tribal funding has been dramatically cut and is expected to be completely cut in 2007. Tribes have been one of the major contributors to monitoring, evaluation and adaptive management work. The FEIS and FPHCP cite two major accomplishments of adaptive management; the Perennial Stream Survey Project and the Desired Future Condition Project. Tribes were major and key contributors to these studies. The drastic funding cuts to the Tribes will greatly reduce adaptive management work.

Tribes have also provided key compliance monitoring on HCP's. Personnel from the Services have expressed appreciation for the on-the-ground compliance monitoring that the Tribes have conducted on HCP's. It is our understanding that the Services have not had the funding or staffing to adequately conduct compliance monitoring and heavily rely on the Tribes for this critical work. Recent funding cuts will prevent compliance monitoring on this proposed HCP.

Funding for adaptive management work and compliance monitoring on the proposed HCP is highly uncertain. Until adequate funding is clearly described and secured for both adaptive management and compliance monitoring, the FPHCP and FEIS should not be approved.

Archaeology:

U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) issue the Incidental Take Permits (ITP) based on the FPHCP. A Federal permit is defined as an "undertaking" [36 CFR 800.16 (y)] in the Nation Historic Preservation Act (NHPA). All Federal undertakings are subject to section 106 of the NHPA. The Yakama Nation has commented on the proposal throughout the review process beginning in April 2003.

In volume II the FWS has acknowledged that their issuing ITP is an undertaking subject to the NHPA. However, FWS states they will determine how best to meet their section 106 compliance responsibilities. The Yakama Nation insists that FWS finish their consultation responsibilities prior to issuing any ITP or a decision on the FPHCP and FEIS.

The FWS admits that part of their section 106 responsibilities is to "gather information to determine if any cultural or historic properties within the area of potential effect are eligible for the National Register of Historic Places" (p.4-263, lines 29-30). Very little non-federal land and non-tribal lands in Washington have been inventoried for historic properties. The FEIS admits that the actual numbers of archaeological sites and resources and historic sites and cultural resources are mostly unknown (p. 4-267, lines 9-11).

The FEIS focuses on state laws, rules, and voluntary processes as a substitute for gathering information about properties that may be affected through the consequences of the ITP. Some statements in the FEIS are inaccurate or misleading. All forest practices may impact cultural, archaeological, or historic sites; not just class III and IV-special forest practices (p.4-264, lines 6-7). The Office of Archaeology and Historic Preservation became a separate agency in July 2005 and is now the Department of Archaeology and Historic Preservation (DAHP). Their organizational structure no longer involves Community, Trade, and Economic Development. The FEIS asserts that forestlands are subject to the constraints of WAC 222, RCW 27.44 and 27.53 implying that they have the same kind of protective requirements for archaeological, cultural, and historic sites as NHPA. They do not.

The FEIS asserts that archaeological, historical, and cultural resources on DNR lands are protected under Forest Resource Plan Policy #24 and the existing State Trust Lands HCP (p.5-56, lines 36-42; p.5-57, lines 1-2). Unfortunately, even though Policy #24 is a condition of the 1997 HCP, WDNR has not established a state-wide program to identify archaeological and historic sites. The assertion that WDNR follows "procedures equivalent to those required under section 106 of the NHPA" is inaccurate (p.5-57, lines 1-2).

To comply with the NHPA, the FWS must make a reasonable and good faith effort to identify historic properties that may be affected by the undertaking and gather sufficient information to evaluate the eligibility of these properties for the National Register [36 CFR 800.4(b)]. This is not a requirement under state laws and rules. The FWS must develop a strategy to physically look for, document, and evaluate all sites that are on or eligible for inclusion in the National Register of Historic Places (NRHP) of all lands to be affected by the permits. The National Environmental Policy Act states that agencies shall prepare draft environmental impact statements concurrently with related surveys required by the NHPA among other federal laws and executive orders (40 CFR 1502.25). FWS has failed to comply with this requirement.

Rather than conducting professionally reasoned surveys of all the lands the permits apply to prior to issuing the ITP, a reasonable strategy would be for the FWS to make a condition of the permits a requirement for professionally reasoned surveys on a project by project basis. Predictive models approved by the Yakama Nation and the State Historic Preservation Officer could also be produced for forested lands in Washington that would trigger required surveys in some instances in the forest practice application process. The WDNR can pass the costs of those professional surveys on to the proponents of the forest practice applications. If the surveys are not conducted and identified sites protected, the ITP would be revoked.